Merle West Medical Center *and* Oregon Nurses Association, Inc. Case 36-CA-3796

July 21, 1980

DECISION AND ORDER

Upon a charge filed on January 20, 1981, by Oregon Nurses Association, Inc., herein called the Union, and duly served onMerle West Medical Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 19, issued a complaint on February 3, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 24, 1980, following a Board election in Case 36-RC-4310, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about November 26, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 12 and 19, 1981, Respondent filed its answer and amended answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 9, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 13, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

[1] Official notice is taken of the record in the representation proceeding, Case 36-RC-4310, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer and amended answer to the complaint Respondent admits that the Union requested bargaining and it refused to bargain so that it could test the validity of the Regional Director's Decision in Case 36-RC-4310 before the National Labor Relations Board and the United States Circuit Court of Appeals. Respondent's denials to the complaint pertained to the allegations concerning the appropriateness of the unit of all regular full-time and part-time registered nurses employed by Respondent, and that it had violated Section 8(a)(5) of the Act. In its response to the Notice To Show Cause, Respondent contends that counsel for General Counsel's Motion for Summary Judgment should be denied on grounds that Respondent did file timely objections that were not litigated at an objections hearing and were not permitted to be litigated at the express direction of the Board; that the certification by the Board was in error inasmuch as Respondent had filed timely objections with respect to substantial misrepresentation of cognate facts in such close proximity to the time of the election that Respondent was effectively denied an opportunity to respond; and that the Regional Director's Decision with respect to challenged ballots is contrary to to existing Board precedent, relative to who should be permitted to vote in a self-determination election. On the other hand, counsel for the General Counsel argues that all material issues have been previously decided and that there are no litigable issues of fact requiring a hearing. We agree with counsel for the General Counsel.

Our review of the record herein, including Case 36-RC-4310, discloses that a Decision and Direction of Election was issued by the Regional Director for Region 19 on May 7, 1980, in which he found that all regular full-time and part-time registered nurses employed by Respondent constituted an appropriate unit.

Respondent thereupon filed with the Board a request for review of the Regional Director's Decision. On June 3, 1980, the Board granted the Employer's request for review of the Regional Director's Decision and Direction of Election on grounds that it raised substantial issues warranting review. Thereafter, by telegram dated June 5, 1980, Respondent requested permission to withdraw its request for review. On June 10, 1980, the Board granted Respondent's request to withdraw its request for review.

An election was conducted among all regular full-time and part-time registered nurses employed by Respondent on June 6, 1980. Of the total number of votes cast, 47 were for, and 45 against,

the Union, with 6 challenged ballots, a number sufficient to affect the results of the election.[2]

On August 15, 1980, the Regional Director for Region 19, issued his Supplemental Decision on Challenged Ballots, Objections to Election, and Order, in which he found no merit in Respondent's objections and overruled them and, in addition, sustained the challenges to the ballots of employees Ruth Case, Diane LaBuwi, Rhoda O'Connor, and Christine Juhl, and ordered that the ballots of Julie Henzel and Pam Uerlings be opened and counted and the results be incorporated in a revised tally of ballots. The revised tally of ballots showed that of the total number of votes cast, 48 were for, and 46 against, the Union.

On August 27, 1980, Respondent filed with the Board a request for review of the Regional Director's Supplemental Decision on Challenged Ballots, Objections to Election. Respondent contended that Ruth Case was an acting head nurse and was not a supervisor; that the finding that employees LaBuwi and O'Connor were ineligible because they did not work an average of 4 hours per week in the previous quarter prior to the payroll eligibility period was based on a standard that is inappropriate in a health care industry; that the election should be set aside because of electioneering by the Union's election observer; and that Respondent was preempted from countering the Union's substantial misrepresentations as to wages due to the 24-hour prohibition on captive audiences.

On November 12, 1980, Respondent's request for review of the Regional Director's Supplemental Decision on Challenged Ballots, Objections to Election and Order was denied by the Board on grounds such request failed to raise substantial issues warranting review. Thereafter, on November 24, 1980, the Officer-in-Charge of Subregion 36, for the Regional Director for Region 19, issued a Certification of Representative, based on a revised tally of ballots and certifying the Union as the exclusive bargaining representative of the employees in the appropriate unit of registered nurses.

On or about December 3, 1980, the Union, by letter, requested that negotiations with Respondent for a collective-bargaining agreement commence at a mutually agreeable time and place. However, by letter dated November 26, 1980, Respondent notified the Union that it would refuse to bargain with the Union on the grounds that it questioned the underlying certification issued by the Board since the Union assertedly made substantial misrepresentations of material facts to eligible voters, in such close proximity to the election that Respondent was effectively denied an opportunity to respond.

We find merit to Respondent's contentions that it was not permitted to litigate its timely objections at an objections hearing; that the Board's certification was in error; that the Regional Director's Decision with respect to challenged ballots is contrary to existing Board precedent; and that the the issue of whether or not an all professional unit would be appropriate as opposed to a separate unit of registered nurses should be relitigated. We find, after reviewing the record herein, that Respondent is merely reiterating the issues previously raised in the underlying representation case, including its request for review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Oregon nonprofit corporation with an office and place of business in Klamath Falls, Oregon, where it is engaged in the business of operating a nonprofit hospital providing in-patient and out-patient medical care. During the past 12 months, a representative period, Respondent derived gross revenues in excess of $250,000. During the same representative period, Respondent in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of Oregon, goods and materials valued in excess of $50,000 directly

[2] Respondent filed objections to conduct of the election contending that the Union's observer at the morning voting session talked to an eligible voter in the hallway outside of the voting area during the afternoon voting session, and that the Union distributed literature to the employees on or about June 4 and 5, 1980, in which it made serious and substantial misrepresentations of fact to eligible voters in close proximity to the election and Respondent was denied an opportunity to effectively respond.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

from sources outside said State, or from suppliers within said State which in turn obtained such goods and materials directly from sources outside said State.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Oregon Nurses Association, Inc., is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All regular full-time and part-time registered nurses employed by Respondent, but excluding directors and assistant directors of nursing, head nurses, education service directors, nursing supervisors, directors of admitting, managerial employees, confidential employees, guards and supervisors as defined in the Act.

2. The certification

On June 6, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 19 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 24, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 3, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 26, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about November 26, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Merle West Medical Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oregon Nurses Association, Inc., is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular full-time and part-time registered nurses employed by Respondent, but excluding directors and assistant directors of nursing, head nurses, education service directors, nursing supervisors, directors of admitting, managerial employees, confidential employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 24, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 26, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Merle West Medical Center, Klamath Falls, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Oregon Nurses Association, Inc., as the exclusive bargaining representative of its employees in the following appropriate unit:

> All regular full-time and part-time registered nurses employed by Respondent, but excluding directors and assistant directors of nursing, head nurses, education service directors, nursing supervisors, directors of admitting, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its hospital in Klamath Falls, Oregon, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Oregon Nurses Association, Inc., as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining

unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All regular full-time and part-time registered nurses employed by Respondent, but excluding directors and assistant directors of nursing, head nurses, education service directors, nursing supervisors, directors of admitting, managerial employees, confidential employees, guards and supervisors as defined in the Act.

MERLE WEST MEDICAL CENTER